Filed 8/7/12 Kosmala v. Vasquez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WENENTA M. KOSMALA, as Trustee in Bankruptcy etc.,

Plaintiff and Appellant,

v.

DOMINIC VASQUEZ et al.,

Defendants and Respondents.

G045156

(Super. Ct. No. 07CC08830)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Alston, Alston & Diebold and Donald A. Diebold for Plaintiff and Appellant.

Tharpe & Howell, Charles D. May, Gene B. Sharaga, and Eric B. Kunkel for Defendants and Respondents.

Wenenta M. Kosmala, as trustee in bankruptcy for the Estate of Merlyn B. Lans, appeals from the judgment entered against Lans in her lawsuit against Lowe's HIW, Inc. (Lowe's) and a roofing contractor, DominicVasquez (sometimes collectively referred to as the defendants). Appellant raises four issues: First, she argues that neither Lowe's nor Vasquez were properly licensed to complete the work on Lans' home, and thus Lans was entitled to restitution of all sums paid for the work; second, she argues the undisputed evidence demonstrated Vasquez's work on the atrium caused damage to Lans' home; third, she claims the court improperly allowed the jury to hear evidence of "collateral source" payments to Lans, which was prejudicial; and fourth, appellant argues the court improperly limited Lans' evidence pertaining to damages, which was also prejudicial. We conclude these arguments lack merit, and we affirm the judgment.

I

Lowe's owns a chain of large, home improvement "warehouse" stores, including several in California. Lowe's holds a license as a "general building contractor" in California, which is sometimes referred to as a "Class B" contractor.[1] A general building contractor license allows the contractor to directly perform framing or carpentry work, and to enter into prime contracts involving other specialty trades, if the contractor is either licensed in that specialty trade, or subcontracts the work to a contractor who is. (§ 7057.)[2]

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[1] These "classes" of contractor's licenses are set forth in Business and Professions Code section 7055, which states that "[f]or the purpose of classification, the contracting business includes any or all of the following branches: [¶] (a) General engineering contracting. [¶] (b) General building contracting. [¶] (c) Specialty contracting." All further statutory references are to the Business and Professions Code, unless otherwise indicated.

[2] As a corporation, Lowe's was required to demonstrate its qualification to hold a contractor's license through a designated "responsible managing employee." (§ 7068, subd. (b)(2).) James Gerow is the responsible managing employee (RME) who qualified Lowe's for its general builder's license. As Gerow explained it at trial, "every

In April 2007, Lans went to the Lowe's store in La Habra to inquire about replacing the roofing on her home and enclosing a central atrium. She spoke to Jose Guevara, a commissioned "Commercial Sales Specialist" for Lowe's, about the project. Guevara was not a construction specialist; instead, by his own description, he "basically [sells] everything in the store, from appliances to installed sales, to roofing, basically commercial buildings, anything you can build a building with, from ground up, even to homeowners, everything in the store, it's not just one department."

After that consultation, Lowe's sent Vasquez to Lans' home to assess the job and provide Lowe's with the information necessary for it to estimate the price to complete the job. Vasquez was a licensed roofing contractor who had been under contract with Lowe's as an "installer" of "roofing material" since 2005.

Vasquez provided an assessment that covered both the replacement of Lans' existing roof, and the enclosure of the central atrium. Lans entered into a contract with Lowe's to complete that work. Lowe's, in turn, assigned Lans' project to Vasquez.

On May 21, 2007, Vasquez obtained a building permit from the County of Orange (the County), and thereafter commenced the work.[3] However, after Vasquez

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corporation that is required to be licensed as a contractor, has to have a contractor that is considered the managing employee for that process within the organization, and I serve that function." Gerow testified that as RME for Lowe's California contractor's license, he is responsible for supervising the contracting work Lowe's performs in California. He explained he carries out that supervision by delegating responsibility to "four area installation managers that directly report to me, and then from there, at each individual store in our region, we have an install sales manager and install sales coordinators who are responsible for the process on a day-to-day basis." According to Gerow, it is the store's "install sales manager and the people who report to him within the store," who are actually "responsible for communicating with the installers . . . and the customer to manage that process from beginning to end." None of those people to whom Gerow delegates supervision of the installation work are themselves licensed contractors.

[3] The building permit obtained by Vasquez identifies the work to be completed at Lans home as "reroof[ing]," and does not mention the enclosure of the existing atrium.

removed the then-existing rafters and ridge beam spanning Lans' atrium, Lans became concerned the removal of that framing was not authorized by her contract, and asked him to stop work. Lans also reported the matter to Lowe's and called the County building department.

On May 31, 2007, the County building department issued a "notice to correct work" on the project, identifying issues including that "owner Lans has concerns about existing rafters and ridge beams has—dry [*sic*] rot damage" and "provide plans for roof rafters." Lans sent that notice to Lowe's. Greg Lovett, the install sales manager for the La Habra store, assured Lans they would speak to Vasquez and address her concerns.

On June 5, 2007, the County issued a second "stop/correct" notice on Lans' project. This notice required, among a few other things, the provision of "approved plans and permit for the enclosure of the atrium, the removal of existing 4x8 [*sic*], and installation of new roof structure . . . . [A] structural engineer must design and approve new roof structure."

Following the County's second notice, Lowe's made some effort to address the issues raised. However, Lans had lost faith in the ability of either Lowe's or Vasquez to complete her job properly. She informed Lovett she would retain a structural engineer of her own choosing to prepare the plans for enclosure of the atrium. And according to Lovett, Lans stated she was unwilling to share those structural plans with Lovett unless Lowe's agreed to pay for them. Lowe's refused to pay for any structural work that it did not contract for directly.

Ultimately, the parties could not move past that deadlock, and neither Lowe's nor Vasquez completed the roofing/atrium work. Instead, Lans hired a different contractor to complete the work in conjunction with the performance of additional remodeling work intended to bring Lans' home in compliance with accessibility standards set forth in the Americans with Disabilities Act (ADA). Apparently, Lans paid

for some or all of the remodeling work with proceeds from a workers' compensation settlement.[4]

Lans filed suit against Lowe's and Vasquez, alleging breach of contract, fraud and deceit, negligent misrepresentation, negligent construction and design (against Vasquez only) and seeking restitution of moneys paid to Lowe's based on the alleged use of a contractor who was not licensed to complete the atrium work. Lans' claims for fraud and deceit and negligent misrepresentation were disposed of before the trial concluded, so the case went to the jury only on the claims for breach of contract, negligent construction and design, and restitution.

During trial, both sides relied heavily on the testimony of both percipient witnesses and expert witnesses to support their positions. While certain aspects of the case were not subject to significant dispute–the parties essentially agreed about what happened, and that defendants held the licenses they claimed–other aspects were hotly debated. Most significantly, the parties disagreed about whether the atrium work performed by Vasquez was properly done, whether that work caused damage to Lans' home, whether Lans was justified in refusing to let Vasquez complete the work, and whether the contractor's license held by either Vasquez or Lowe's qualified Vasquez to undertake and complete that work.

After the conclusion of evidence, both sides asked the court to declare them the victor on the restitution claim: Lans moved for a directed verdict in her favor, arguing the evidence was insufficient to support a jury determination that either of the defendants' licenses qualified them to undertake the work. Lowe's moved for a nonsuit arguing the opposite. The court denied both motions, explaining, "We've had expert testimony [and they] have talked about the work of . . . Vasquez, [a] couple of them

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[4] Lans obtained a workers' compensation award in mid-2007, which included approximately $154,000 for "ADA Home Modification," as well as approximately $337,000 for "Indemnity and Home Health Care."

thinking it was appropriate, and [another] of course thinking it was inappropriate. [¶] I'm going to let the jury make the decision."

The verdict form submitted to the jury required it to answer specific questions pertaining to each of Lans' remaining causes of action. With respect to Lans' cause of action for breach of contract, the jury found that while Lans and Lowe's entered into a contract, Lans had neither performed, nor been excused from performing, her obligations under that contract. Having made those requested findings, the jury was instructed to skip the remaining four questions pertaining to Lans' breach of contract claim.[5] Consequently, the jury did not reach the issues of whether Lowe's breached the contract, whether that alleged breach harmed Lans, or the extent of damages caused thereby. [6]

With respect to the negligence claim, the jury was first asked to decide whether Vasquez was negligent, and if it answered that question in the affirmative, to then address whether his negligence caused Lans harm. Only if the jury found causation was it then directed to assess damages. However, the jury concluded Vasquez was not negligent, and thus it did not address either the questions of causation or damages.

And with respect to the restitution claim, the jury was asked whether Vasquez had a valid "Class C-39" roofing contractor's license at the time he performed the work on Lans home. Having answered that question "yes," the jury was instructed to determine whether that license "qualif[ied] him to install the atrium enclosure on [Lans']

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[5] Having failed to establish either that she performed as required by the contract terms, or grounds excusing her from performance, Lans could not prevail on a cause of action for breach of contract. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745 ["the elements of the cause of action are the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages"].)

[6] Although the breach of contract claim was alleged against both Lowe's and Vasquez, the jury was asked to make findings pertaining to Lowe's only. The parties do not explain this discrepancy.

home, as called for in the . . . contract with Lowe's." (Some capitalization omitted.) The jury answered that question "Yes" as well, and was consequently directed to skip the remaining questions pertaining to the restitution claim. Thus, the jury made no findings pertaining to whether the atrium work was authorized by Lowe's own Class B contractor's license, and no findings pertaining to the amount of restitution that might be owed, or the assessment of any penalty stemming from the defendants' alleged improper licensure. Based upon the jury's verdict, the court entered judgment in favor of the defendants.

II

A. The Licensure Issue

Appellant first contends the judgment must be reversed to the extent it denied Lans restitution of the sums she paid Lowe's for Vasquez's work. The restitution claim is based on section 7031, subdivision (b), which states in pertinent part, that "a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract."

Appellant argues an analysis of the contractors' licensing statutory scheme demonstrates, as a matter of law, that Vasquez's C-39 roofing license did not qualify him to perform the extent of framing work necessary to enclose the atrium at Lans' home. Moreover, appellant asserts that because Lowe's RME made no effort to directly supervise the work, it cannot be viewed as having been performed pursuant to Lowe's own contractor's license. According to appellant, these contentions present "pure questions of law, not involving the resolution of disputed facts" and are thus subject to our de novo review.

The defendants counter that appellant's characterization of the licensure issue as a pure issue of law is irreconcilably inconsistent with the theory upon which

Lans actually tried her case; i.e., that the sufficiency of the defendants' licensure was an issue of fact to be decided by the jury. We agree.

As the trial court explained (in rejecting both Lans' motion for directed verdict and Lowe's motion for nonsuit), the parties offered the jury not only foundational evidence pertaining to the scope of work involved in the atrium enclosure, but also expert testimony addressing the ultimate issue of whether the defendants' licensure qualified Vasquez to perform the atrium work. Specifically, Lans offered the expert testimony of a structural engineer, who opined directly on the issue of whether "[a] C-39 roofing contractor [is] allowed to do the framing work entailed in the atrium enclosure . . . Lans requested and contracted for with Lowe's." His opinion was that a C-39 roofing contractor was not allowed to do that work because "[i]t's clearly additional framing to the original structure that is well anticipated in advance. It would be required that it be installed by either a framing subcontractor or a general contractor, in this instance. So that would be either a C-5 or B-1 license."

The defendants offered their own expert testimony on the point, including testimony from a licensed civil engineer. His opinion squarely contradicted that of Lans' expert. The defendants' expert first explained Vasquez's framing work done in connection with enclosing the atrium was not structural, and it did not affect the structural integrity of the home. He determined the "beam rafters" that Vasquez had removed from the original atrium as part of his preparation for enclosing the atrium were merely "decorative" and not structural. He also opined the additional materials required to enclose the atrium would not have added significant weight to the existing roof.

The defendants' engineer was asked, without objection from Lans, "[i]f a C-39 contractor does this type of work, but does not affect the structural integrity of the home, can he do this type of work in your opinion?" The expert answered, "Yes." Lans' attorney then cross-examined the engineer at some length on the parameters of framing work that can be properly completed by a contractor with a C-39 roofing license. Lans'

counsel specifically questionined him on the legal definition of what a C-39 roofer is allowed to do.

In closing argument to the jury, Lans' attorney asserted "the question of whether [Vasquez] is improperly licensed or whether Lowe's is improperly licensed is a matter of fact for you to decide. . . . It depends on did somebody show some level of competence to the state that they could do the job competently so that way . . . Lans has the full protection of the licensing law." And, as we have already noted, one of the specific questions posed to the jury in the verdict form was, "Did [Vasquez's] Class C-39 California Specialty Roofing Contractors License qualify him to install the atrium enclosure on [Lans'] home, as called for in the . . . contract with Lowe's . . . ?" (Some capitalization omitted.) The jury answered this question, "Yes."

Based upon these facts, it is clear Lans elected to treat the issue of whether Vasquez's license qualified him to do the atrium framing work as a question of fact for the jury to resolve with the assistance of expert testimony. This is similar to the approach commonly used in medical malpractice cases: The jury relies on the testimony of experts in the field to both establish the professional standard of care applicable in a particular situation, and explain whether the defendant's conduct fell below that standard. These are conclusions that a lay jury is generally not otherwise qualified to reach. (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1547 [plaintiff in medical malpractice action "must show by competent expert evidence that defendant's medical treatment fell below the community standard of care"]; *Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 800, citing *Landeros v. Flood* (1976) 17 Cal.3d 399, 410 ["A physician's standard of care is the key issue in a malpractice action and can only be proved by expert testimony unless the circumstances are such that the required conduct is within the layperson's common knowledge"].)

Because Lans chose to try her case that way, appellant (Lans' surrogate) cannot ignore that choice on appeal. Appellant cannot instead claim the issue of whether

the defendants' licenses were sufficient to qualify them for Lans' job presents a "pure issue of law" to be resolved by this court through a de novo analysis of the very same licensing scheme that was addressed by the experts at trial. (See e.g., *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619,630 (*Tesoro del Valle*).)

In *Tesoro del Valle,* appellant homeowners submitted to the jury the issue of whether defendant had complied with the requirements of a statute. (*Tesoro del Valle, supra,* 200 Cal.App.4th at pp. 629-630.) After the jury decided that issue in favor of defendant, appellants tried a different tactic on appeal, claiming the issue "was a question of law that should not have been submitted to the jury." (*Ibid.*) The appellate court rejected that effort, explaining "Appellants are bound by their decision to submit to the jury the question of [defendant's] compliance with [Civil Code] section 714. As aptly stated by the court in *Shumate v. Johnson Publishing Co.* (1956) 139 Cal.App.2d 121, 130: 'A party cannot successfully take advantage of asserted error committed by the court at his request. [Citation.] The request that the jury be instructed as requested by defendants necessarily constituted consent to submission of the issue as a question of fact to be resolved by the jury. [Citation.] A party cannot request that an issue be submitted to a jury as a question of fact and on review escape the consequences.'" (*Id.* at p. 630)

In her reply brief, appellant attempts to explain why her characterization on appeal of the licensing issue as a "pure question of law" does not represent a departure from the way in which the issue was presented at trial. According to appellant, the key facts underlying the issue were actually "undisputed," and in the absence of disputed facts, resolution of her contention on appeal is simply a matter of applying the law to those undisputed facts. We are not persuaded by this argument.

The flaw in appellant's contention is that it simply ignores the role played by the experts at trial below. As we have already noted, both sides relied upon experts to

explain to the jury how the contractors' licensing scheme applied to the facts of this case. The experts offered opinions on whether some combination of Vasquez's C-39 roofing license, and Lowe's general building contractor license, qualified Vasquez to undertake and complete the atrium work. That is the very same issue appellant would now like us to evaluate as a matter of statutory construction on appeal. In essence, appellant wants us to opine, de novo, on the merits of the expert opinions offered at trial. We cannot. Those opinions were offered, without objection, to the jury, and they were consequently in evidence. It is not our role on appeal to agree, or disagree, with the substance of evidence admitted at trial.

Appellant's failure to acknowledge the expert testimony at trial highlights another problem with her argument. Her assertion the "undisputed facts" (a term more commonly associated with summary judgment motions) requires reversal of the judgment amounts to a contention the judgment was not supported by substantial evidence. That argument is a difficult one to make, let alone win. "An appellate court '"must *presume* that the record contains evidence to support every finding of fact . . . ."' (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887, italics added.) "It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. [Citation.] This burden is a 'daunting' one. [Citation.] 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable,* and *show how and why it is insufficient*. [Citation.]' [Citation.]" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

In this case, appellant's insufficiency of the evidence argument was made without even acknowledging, let alone summarizing and explaining away, the expert testimony pertaining to the licensing issue. Having failed to do that, appellant waived any challenge to the sufficiency of the evidence. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 540-541.)

Because Lans chose to treat the issue of whether Vasquez was properly licensed to complete the work on her atrium as a question of fact to be decided by the jury with the aid of expert testimony, appellant is bound by that choice on appeal. And as the jury found against Lans on the point, it was incumbent on appellant to demonstrate the jury's finding was not supported by substantial evidence. She failed to do so, and thus failed to demonstrate reversible error with respect to the point.

B. Evidence of Damages

Appellant next asserts–quite briefly–that the work Vasquez did on the atrium "caused damage" to Lans' home. It is not entirely clear what appellant intends to achieve by this assertion, which she presented in her opening brief as a supporting point for her restitution argument. However, because we do not view it as germane to the restitution claim, we will assume appellant intended to present the argument as an independent basis for reversal of the judgment.

Again, while appellant does not characterize it as such (or at all), we construe this argument as an attack on the sufficiency of the evidence to support a determination Vasquez's atrium work did not cause damage to Lans' home. Appellant's argument is essentially a summary of the favorable evidence suggesting the atrium work impaired the home's structural integrity. We find the attack unpersuasive because it omits any mention of the opinion expressed by the defendants' civil engineer. He opined the atrium work caused no structural damage to either the roof or the walls of Lans' home. He determined the increased weight of the work "had no significant effect" on the home. Stated simply, the evidence was disputed on the point.

In any event, even if we agreed the evidence compelled the conclusion Vasquez's work caused damage (and we do not), appellant has not explained why that determination would be significant in light of the jury's unchallenged determination Vasquez was *not negligent*. Proof of causation, standing alone, does not warrant reversal of a defense judgment, because Lans could only prevail if she proved all the elements of

her negligence claim. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 ["In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages"].) The same rule pertains to a claim for damages caused by a breach of contract: Absent proof of defendant's breach, there can be no recovery. (*Centex Golden Construction Co. v. Dale Tile Co.* (2000) 78 Cal.App.4th 992, 1000 [it is plaintiff's "burden to prove all the . . . elements necessary to recover on its contract claim"]; Evid. Code, § 500.)

Because the jury made no findings in Lans' favor on *any* of the elements of her causes of action, the mere assertion that damage to her home was established by the evidence (even if true) would not entitle appellant to any relief on appeal.

C. Workers' Compensation Evidence

Appellant next contends the court erred by allowing the jury to hear evidence pertaining to Lans' receipt of an unrelated workers' compensation award. Specifically, the jury learned the award included significant funds to renovate her home so it would be suitable for someone with her work-related disability, and it also referred to compensation for injury to her "psyche." Appellant claims the award qualified as a "collateral source" payment and that Lans' receipt of it was irrelevant to the issues in the case. She concludes allowing the jury to hear about the award was prejudicial. We disagree.

We start with an explanation of the collateral source rule. It is a rule of substantive law, which "precludes deduction of compensation the plaintiff has received from sources independent of the tortfeasor from damages the plaintiff 'would otherwise collect from the tortfeasor' [Citation.]" (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 548 (*Howell*).) In most cases, the collateral source rule is applied to ensure "that an injured plaintiff may recover from the tortfeasor money an insurer has paid to medical providers on [plaintiff's] behalf." (*Id.* at p. 551.)

As a general matter, the practical effect of the collateral source rule is to limit the introduction of evidence: "The collateral source rule has an evidentiary as well as a substantive aspect. Because a collateral payment may not be used to reduce recoverable damages, evidence of such a payment is inadmissible for that purpose. Even if relevant on another issue (for example, to support a defense claim of malingering), under Evidence Code section 352 the probative value of a collateral payment must be 'carefully weigh[ed] . . . against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations.' [Citation.]" (*Howell, supra,* 52 Cal.4th at p. 551.)

In this case, Lans filed a motion *in limine* at the beginning of trial, seeking an order excluding any reference to the workers' compensation award before the jury. Lans argued the payment qualified as a collateral source payment that could not be relied upon to mitigate any damages caused by the defendants. For their part, the defendants argued if the payment fell within the collateral source rule, it was nonetheless relevant and admissible on another point.[7] Specifically, the defendants cited Lans' contention she was forced to liquidate other financial assets to pay for the repair of the defendants' shoddy work on her atrium, and was thus entitled to additional damages representing her loss of income from those liquidated assets. It was the defendants' position that Lans' liquidation of the assets was not in fact caused by any perceived need to repair the atrium, but was instead prompted by unanticipated delays in her receipt of the workers'

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[7] The defendants argued below, and reassert on appeal, that the workers' compensation payment does not technically qualify under the "collateral source" rule, since the payment was wholly unrelated to their alleged wrongful conduct, and was not intended to address or to compensate Lans for any damage *they caused* to her home. Technically, they may be correct. Unlike the payments made by a medical insurer for treatment of physical injuries inflicted on plaintiff by a tortfeaser, these workers' compensation payments were not prompted by any damage defendants' did to Lans or her home. But that argument does not help the defendants. To the contrary, it only emphasizes why, consistent with the principles underlying the collateral source rule, they should be precluded from asserting Lans' receipt of unrelated money reduced the damages she could recover *from them* for whatever harm they did inflict.

compensation award. Thus, the defendants asserted evidence of the workers' compensation payment, and its timing, was necessary to counter Lans' assertion they were liable for the financial consequences of her liquidation decision.

The court agreed with both sides, concluding that while the workers' compensation payment was excludable as evidence mitigating Lans' damages, the defendants could nonetheless rely upon the evidence to address causation of Lans' claimed asset liquidation. Thus, the court ruled defendants could introduce evidence of "when that money was available for the retrofitting [of Lans' home] for the [ADA]."

Thereafter, defendants made reference to the workers' compensation award, including comments that arguably went beyond the issue of "when the money was available", but Lans did not object to those comments when made. Lans did object to the admission into evidence of documents reflecting the terms of her award, and after both sides had rested, she asked the court to instruct the jury that it could not deduct anything from her damages award based on her receipt of the workers' compensation award. The court refused to give that instruction.

On appeal, appellant asserts the court's decision to allow evidence of the worker's compensation award was an abuse of discretion under Evidence Code section 352. She maintains the evidence was both "completely irrelevant," and it prejudiced the jury in the following two ways: (1) it allowed the defendants to argue that in light of the further extensive remodeling of Lans' home paid for by the workers' compensation award, Lans "was not damaged" by their allegedly negligent work on her atrium; and (2) the award's reference to compensation for injury to Lans' "psyche" encouraged the jury to view her as unreasonable.

Evidence Code section 352 gives the court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The court's exercise of

discretion will be upheld on appeal unless we conclude that it "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodriques*).) We can make no such finding here.

Initially, we cannot accept appellant's assertion that evidence of Lans' workers' compensation award was "completely irrelevant." In making that argument, she fails to even acknowledge, let alone undercut, the argument made by the defendants below. As stated above, they asserted the evidence was directly relevant to counter Lans' effort to hold them responsible for her claimed collateral financial damage. In keeping with our obligation to indulge all inferences in favor of the ruling below, we must presume the disputed evidence was relevant in the absence of an affirmative demonstration by appellant that it was not. And here, appellant made no such demonstration. (*County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 70 [appellate courts "indulge any legitimate and reasonable inference in favor of a trial court's express or implied finding"].)

As for prejudice, we first reject the notion that the jury's verdict would have been tainted by the evidence Lans had suffered some prior injury to her "psyche." Lans was not the defendant here, and thus the reasonableness of *her conduct* was not an issue the jury was asked to address. In any event, we note any evidence Lans had suffered a prior emotional injury was just as likely to cause the jury to view her as vulnerable, and thus in need of special protection against unscrupulous contractors, as it was to cause the jury to view her as unreasonable.

With respect to the alleged prejudicial effect of the defendants relying on the workers' compensation award as a basis for arguing Lans "was not damaged," we return to a point we have already made: The jury verdict demonstrates Lans lost this case *on liability* without the jury even reaching the issue of damages. And because the jury was never called on to assess the extent of Lans' alleged damages, we could not possibly

conclude the erroneous admission of evidence undercutting Lans' damage claim would have had any material effect on the judgment. It cannot be said admission of the evidence "'resulted in a manifest miscarriage of justice.'" (*Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) Based on the foregoing, we conclude the admission of evidence regarding the workers' compensation award provides no basis for reversing the judgment entered against her.

D. Expert Testimony

Appellant's final assertion is that the court erred by first restricting, and then excluding entirely, the testimony of her damages expert, Steven Lottatore. She explains Lottatore was "prepared to offer testimony segregating and apportioning the subsequent actual repair costs between the completion of the atrium enclosure repair and the ADA modifications." She argues the testimony was important because "California law has long held that evidence that monies for repairs were actually paid is proof that those repair charges are reasonable."

However, appellant explicitly concedes "the court eventually excluded . . . Lottatore's testimony in its entirety *because Mr. Lottatore did not calculate an independent cost of repair at his deposition.*" (Italics added.) She makes no effort to explain why the court's exclusion ruling was not actually justified on that basis. Generally, the trial court has broad discretion to exclude expert testimony at trial on the ground it exceeds the scope of the expert's deposition testimony. (See, e.g., *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780 ["a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert is unreasonably difficult"].)

In light of that discretionary power, it was incumbent upon appellant to convince us the court here acted arbitrarily and without a sufficient basis in concluding Lottatore's proposed trial testimony represented such a significant departure from what

he had testified to at deposition as to be unfair to defendants. And because appellant has made no effort to do that, her reliance on the purported relevance of the excluded testimony as a basis for attacking the decision is simply unavailing. As always, we presume the court's ruling was justified, and it is up to appellant to affirmatively dispel that presumption. She failed to do so.

But even if appellant had attempted to establish the court abused its discretion in excluding Lottatore's trial testimony, the effort would not have entitled her to any relief in this appeal. Again, absent a successful challenge to the jury's adverse findings on liability, she simply cannot prevail by arguing the court committed prejudicial error with respect to damages.

III

The judgment is affirmed. Respondents are to recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.